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January 15, 2003

BY ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W., Room TWB-204
Washington, D.C. 20554

Re: Ex Parte Presentation in CC Docket Nos. 01-338, 96-98, 98-147

Dear Ms. Dortch:

I have attached a written *Ex Parte* presentation on behalf of NuVox, Inc.

In accordance with Section 1.1206 of the Commission's rules, this letter is being provided to you for inclusion in the public record of CC Docket Nos. 01-338, 96-98 and 98-147.

If you have any questions concerning this filing, please communicate directly with the undersigned.

Respectfully submitted,



John J. Heitmann

JJH:cpa

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January 15, 2003

Mr. Christopher Libertelli
Legal Advisor
Office of Chairman Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte*
CC Docket Nos. 01-338, 96-98, 98-147

Dear Mr. Libertelli:

On behalf of NuVox, I am writing to provide further information for the Commission's consideration in the above-referenced dockets regarding access to EELs. Specifically, I am writing to comment on the concept of "primary local provider", "primary local exchange carrier", or "primary local exchange service" and to respectfully submit that:

- (1) the concept of "**primary local provider**" (or similar) is *not* one that should be incorporated into any use restriction that the Commission ultimately may determine is necessary in association with its application of an impairment standard; and
- (2) if the Commission is attempting to determine whether CLECs are using EELs to compete directly with the ILECs and are not predominantly IXC's attempting to replace their embedded base of special access circuits used to provision interexchange voice and data offerings, it should instead focus on whether a CLEC seeks to use the EEL to effectuate its general offer of any, some or all "**LEC services**", which we define to include local voice, exchange access, Internet access, and point-to-point local data services.

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Tying any constraint to the offering and provision of "LEC services", rather than a "primary local provider" standard, would sufficiently address any desire the Commission might have to obtain additional assurance (beyond carriers' ordinary commitment to adhere to the Commission's rules and the Commission's unquestioned authority to enforce such rules) or indication that an IXC is not using EELs predominantly to replace special access services, upon which it historically had relied to facilitate its provision of interexchange services, without demonstrating a significant adjustment in its business plan, as evidenced by a general offer of LEC services and the use of the circuit to provision LEC services (and not solely to facilitate the provision of interexchange services).

A "primary local provider", "primary local exchange carrier", or "primary local exchange service" criterion – even with careful definition – is a tremendously problematic as it easily result in:

- (1) arbitrary line drawing ("what constitutes primary?", "will it limit competition to local voice competition?", "will the Commission pick a percentage of some sort?", "how will it apply, and on what basis?"),
- (2) measurement problems ("why should we have to measure things we don't or can't measure and that the ILECs don't have to measure?"),
- (3) policing problems ("why should the ILECs police CLECs?" and "why should CLECs have to police their customers?"),
- (4) regulations that unnecessarily stymie competition ("will the ILECs be able to (mis)use this standard to assist in their efforts to kill UNEs as a viable entry method?") and retard innovation ("is there undue risk in doing something differently, more efficiently, or better than the ILEC?"),
- (5) a public relations problem for CLECs that may be forced to raise rates or abandon certain market segments and that may be forced to once again to revamp business plans based on yet another new set of rules and convince investors that they should be more patient still.

For all of these reasons and more, the concept of "primary local provider" should *not* be incorporated into the Commission's impairment analysis or any use restrictions that may some how derive therefrom.

NuVox respectfully submits that a better approach, if such an approach need be taken at all, would be for the Commission to make a qualifying determination that takes into account a

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CLEC's business plan, as revealed by its offering of LEC services in direct competition with the Bells and other ILECs. In particular, the Commission could request precertification that a CLEC offers any, some or all LEC services (local voice, exchange access, Internet access, and point to point local data). For example, NuVox's business plan contemplates its making available "integrated T1" service offerings that may include all, some or one LEC service(s). NuVox's most popular product is an integrated T1 product that includes local voice, exchange access, and Internet access over an integrated T1. NuVox also offers T1 products that allow customers the flexibility of keeping ILEC voice services while using NuVox for Internet access or point-to-point local data. NuVox also offers T1 products that allow customers to choose NuVox for their local voice and local data needs (typically Internet access) and for offering exchange access to an IXC other than NuVox (NuVox currently resells long distance services to a majority of its customers but does not have a stand-alone long distance service offering). To provide these LEC services, NuVox has made significant investments in switching equipment, collocations (and associated equipment), and integrated access devices deployed at customer premises.

NuVox offers this profile not to suggest that other CLECs need to do things as NuVox does them, but rather to demonstrate that its business plan, as reflected not only by its highly successful bundled, "integrated access device"-provisioned T1 products, but also by its separate Internet access and point-to-point local data only T1 service offerings, indicates that NuVox intends to and does compete with the Bells and other ILECs head on in the provision of LEC services to small and medium sized business customers across its various markets. DS1 EELs (and DS1 UNE loops) are an essential ingredient to the success of this business plan and NuVox's ability to make these service offerings available at affordable prices to small- and medium-sized business customers.

In light of the foregoing, NuVox offers a modified version of the use restriction it had proposed on January 10, 2003, in an *ex parte* Letter to Michelle Carey jointly filed with SNiP LiNK, Xspedius and KMC Telecom, that should be considered only if the Commission deems use restrictions necessary.¹ As with NuVox's prior proposal, this constraint balances the need for flexibility to accommodate various CLEC business plans with the perceived need to discourage gaming by IXCs and the *demonstrated need* to eliminate opportunities for gaming by ILECs. For that reason, the constraint proposed continues to incorporate a bright-line rule (that would have to be supported by an impairment analysis) and a menu of criterion (adjusted here in some respects) by which a CLEC may pre-certify its meeting various easily discerned indicia of

¹ In addition to modifying its proposal to include the term "LEC services", NuVox also has (1) replaced the switching indicia with a CLEC certification indicia, (2) clarified the interconnection trunks indicia to account for the fact that interconnection trunks may in some cases be ordered through the ASR or as dedicated transport UNEs, per specific terms of interconnection agreements or SGATs, and (3) expanded upon the collocation indicia to better account for the varying network architectures of other CLECs. Modifications to the January 10, 2003 proposal are highlighted in the modified proposal attached hereto.

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compliance with the rule. Such pre-certification is intended to eliminate the need for audits which already have wastefully consumed too many resources. It should also limit the need for enforcement, which the Commission and or the states, nevertheless, ultimately remain charged with ensuring.

The modified constraint proposed herein contains a "2 out of 5" standard, which the Commission may consider modifying itself, for example to require compliance with a third criterion (making it a "3 of 5" standard), or perhaps one of two or more alternative third criteria (making it a "2 plus 1 of 3" standard). If the Commission were inclined to do so, NuVox requests that it strive to continue to contemplate the various business plans of CLECs that seek to use EELs to provision any, some or all LEC services. By including alternatives and avoiding a long list of required criteria, the Commission can, if it chooses to go down this road again, (1) avoid relegating CLECs to one part of the local market by including a mandatory local voice requirement, and (2) accommodate the needs of a broader segment of facilities-based CLECs that have varied business plans and network architectures, but nevertheless currently are delivering the benefits of competition and broadband through their provision of competitive LEC services.²

NuVox's revised proposal is attached hereto. As with our prior submissions in this regard, this submission is designed to address the desire the Commission may have to find that carriers that offer only interexchange services and do not intend to offer LEC services in a meaningful way not be able to convert their base of special access circuits to EELs. And, again, I must underscore that it is NuVox's view that use restrictions have had detrimental consequences beyond any possible benefit and that their continued application on conversions from special access to EELs – or their introduction with respect to new EELs – will provide fertile ground for ILEC gaming, cast a dark cloud on the prospects of all facilities-based CLECs that have built a business that incorporates the use of UNEs, and delay the benefits of competition and availability of broadband to wide swath of end users hungry for such benefits. In short, application of the impairment test, coupled with enforcement, is all that is required. Experience has confirmed that use restrictions are a bad idea that should be eliminated and neither continued nor expanded.

² Wholesale CLECs may, at their option, and in lieu of their own precertification, may offer precertification by the CLEC using its wholesale service offerings in the provision of retail services.

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It is our hope that this submission advances the debate further still on these extraordinarily critical matters. Please do not hesitate to contact me, if I can provide additional explanation or responses to additional concerns.

Respectfully submitted,



John J. Heitmann

JJH:cpa

cc: Matt Brill
Jordan Goldstein
Dan Gonzalez
Lisa Zaina
Bill Maher
Jeff Carlisle
Michelle Carey
Tom Navin
Jeremy Miller
Julie Veach
Mike Engel
Qualex

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Attachment

A requesting carrier may not convert SPA circuits to EELs if such circuits are used to serve a customer for which the requesting carrier provides [REDACTED] (local voice or exchange access or Internet access or local data services) in competition with the ILEC.

Compliance with this constraint can be verified via limited post-provisioning probable cause-based audits or, at the CLEC's option, by pre-certification that at least two of the following compliance indicia are met:

- ☐ [REDACTED] or
- ☐ the CLEC offers [REDACTED] (local voice, exchange access, Internet access, local data) in the LATA; or
- ☐ the CLEC has active interconnection trunks [REDACTED] with the ILEC in the LATA; or
- ☐ the circuit is connected to a collocation in an ILEC end office [REDACTED]
- ☐ the CLEC assigns a local telephone number associated with the circuit.

An ILEC may file an **enforcement action** at the FCC or state commission, if it has reason to believe that the CLEC has falsely pre-certified compliance or that it no longer remains in compliance with the bright-line rule set forth above.

At a CLEC's option, it may opt not to pre-certify compliance with any of the above indicia and instead accept that an ILEC may **audit** its compliance with the bright-line rule set forth above. Such audits must (a) be triggered by a probable cause standard – a demonstrable and rationally related concern regarding compliance – no random or routine audits; (b) be conducted by an AICPA-compliant independent third party auditor acceptable to both parties; (c) not require burdensome production or record keeping; (d) be limited to once in a twelve month period - barring finding of more than de minimis (>10%) non-compliance (which would justify a one audit per six month period standard until an audit uncovered no more than de minimis (>10%) non-compliance); (e) be paid for by the ILEC – with cost shifting on a pro-rata basis, if certain circuits are found to be ineligible; (f) be subject to state PUC or FCC review prior to any true-up or switch to SPA rates.